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In The

Supreme Court of the United States

October Term, 1978

No. 78- 78-717

JARRELL GARONZIK, individually and as executor of the Estate of MILBURN GARONZIK, Deceased, and as Representative of That Class of Persons and Legal Enities Who Purchased Horizon Corporation Stock from SHEARSON, HAMMILL & CO. INCORPORATED during that period from February 18, 1971 to September 26, 1972,

Petitioners (Plaintiffs)

vs.

SHEARSON, HAYDEN STONE, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

"If this Court were shown that, in the Fifth Circuit, the actual trial records were supplanted by astrology or numerology as

predicates for judgments, the Supreme Court would grant certiorari without delay to stop this practice.

"The equivalent is taking place. Trial records are supplanted, not by astrology or numerology, but by something much more damaging, and that is an inadvertent process and practice whereby cliches and phraseology misconstrue the record factually and thus emasculate Rule 23."

(see page 28 of this Petition)

Petitioners were brothers who purchased over $12,000 of Horizon Corporation stock from Respondent brokerage house because of a 19-month long, written campaign by the Respondent to sell this stock. The stock was recommended without any meaningful research by the brokerage house, unless ten hours of "work", *including* lunches with fellow brokers, constitutes "research". Proof of the fraud, as customary in these 10-b(5) cases, had to be produced through the testimony of the defendant.

Respondent contested class certification on the sole grounds that one plaintiff was an attorney. No attack was made upon this plaintiff personally or professionally, as he is an old attorney with an impeccable reputation. The sole contention by the Respondent was that the plaintiff-attorney could not represent the class as class representative and attorney, and therefore, the class action had to be dismissed. The disqualification of the plaintiff-attorney was then imputed to the brother.

The trial court, on this bare bones record alone, refused certification. Thus, a per se ruling was made that an attorney could not act as class representative and attorney in a securities case

involving Rule 23 of the Federal Rules of Civil Procedure and Rule 10b-5 of the Securities Exchange Act.

Another trial judge created a second grounds for certiorari in ruling that since the plaintiff-attorney was a sophisticated investor he was atypical of his class and could not represent any class, either sophisticated or unsophisticated investors, as he was in conflict with both classes. There was no hearing to indicate that any of the purchasers were unsophisticated, and, if they were, why the case could not be divided into classes and why the plaintiff could not represent his class of sophisticated investors.

The plaintiff-attorney, early in the litigation, had requested permission to resign as class attorney in order to preserve the class action. The Court refused to take action on this. The plaintiff-attorney thereafter did resign as class attorney, and did employ other attorneys to represent the class, thus exercising a power he would have had at the beginning of this suit. Nevertheless, the Court refused certification of the class, thus acting directly contrary to the Seventh Circuit in the case of *Susman v. Lincoln American Corporation*, 561 F. 2d 86 (7th Cir. 1977).

The Fifth Circuit affirmed. It holds that Rule 23 does not create any definable, clear, enforceable rights. Certification, in the Fifth Circuit, is a matter of "discretion" of the trial court.

OPINION BELOW AND JURISDICTION

The opinion of the Circuit Court for the Fifth Circuit is appended. It was dated June 12, 1978. Motion for rehearing was denied on September 13, 1978. The opinion is recorded at 574 F 2d 1220. This petition is being filed within 90 days after

rehearing was denied. Attention is particularly invited to the three trial orders also appended as they constitute exhibits to support a fifth ground for certiorari, and this is the fact that trial records in the Fifth Circuit are not inviolate, but are negated by consistent factual misconstructions of the trial record, thus creating an inadvertent, but basic violation of the Fifth Amendment as well as Rule 23 — a practice that must be arrested without a delay, as no one is secure in life, liberty, or property while this practice is allowed to persist.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C., Section 2343(1).

QUESTIONS PRESENTED

QUESTION ONE:

What status, if any, does an attorney have as class representative and class attorney under Rule 23, Federal Rules of Civil Procedure?

The basic question presents a number of important corollary questions illustrated by this case. The Supreme Court, by answering the basic and following corollary questions would avoid vast amounts of future litigation.

(1) What is the ultimate issue in a hearing on certification? Is the ultimate purpose to see that the alleged wrong is ably presented and prosecuted, or is the ultimate question the personality of the class representative and attorney? If the two points should come into conflict, which should prevail? What governs — the facts of the case or the personality of the class representative and attorney?

(2) Is ability a qualification or a disqualification for representing a class?

(3) May the strong represent the weak in class action litigation, or is superior knowledge a disqualification as held in this case?

(4) Is an attorney disqualified from being class representative and attorney on the sole and only record fact that he is an attorney?

(5) If an attorney is not disqualified, then can a Court, as here, disqualify the attorney solely because he is an attorney, on the theory that in some cases the Court will certify the class and in others it will not do so? In short, can anarchy exist on this point as admitted by both the trial court and the Circuit Court in this case?

(6) Where does "discretion" end and anarchy begin? Must discretion be predicated upon a factual record or may it be predicated upon assumption?

(7) Must a hearing precede class certification? If so, must the findings of the Court be predicated upon the hearing, or may the Court create its own record by surmising facts or negating facts by theorizing factual assumptions?

QUESTION TWO:

What status, if any, does a "sophisticated investor" have as class representative and class attorney under Rule 23, Federal Rules of Civil Procedure, and Rule 10b (5).

Similar corollary questions exist here as in Question One.

QUESTION THREE:

In a class action suit wherein an attorney seeks to represent his class, can a class action be perpetually destroyed because the class representative and attorney is an attorney, or can the error, if any, be cured by the attorney's resigning and employing other attorneys to represent the class, as held in the Seventh Circuit?

QUESTION FOUR:

Does Rule 23 provide rights which trial courts must enforce, or does it provide privileges which the trial court may, or may not, enforce at its undefined and arbitrary "discretion"? Does the Supreme Court rule of *Rio Grande v. Gildersleeve,* 174 U.S. 1102 (1899), which asserts the rule of law, still exist?

QUESTION FIVE:

In class action suits, can trial judges surmise basic facts without any hearing, or theorize "reasons" without a factual or logical predicate, thus negating the established record before the Court and creating a record contrary to the record established before the Court?

While the first four questions provide four important and obvious reasons, this fifth reason goes to the essence of the judicial process. If the trial record in Courts of the United States be *not* inviolate, as here, then no one can be secure. If processes of factual misconstruction be permitted, what constitutional safeguards does one have?

QUESTION SIX:

What does "typical" mean in Rule 23? Does it mean not "in conflict with"? If so, is a sophisticated investor in conflict with unsophisticated investors and, if so, why? Is an attorney in conflict with members of his own class and, if so, why? Can conflict exist merely because a trial court says so, without evidence or reason to back up the statement? *CAN WORDS HAVING A FACTUAL MEANING BE PLUCKED OUT OF THE THIN AIR BY TRIAL COURTS SO AS TO DEFEAT CLASS CERTIFICATION?*

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The United States Constitution, Amendment Five: "No person shall be . . . deprived of life, liberty or property, without due process of law."

Rule 23, Federal Rules of Civil Procedure: "One or more members of a class may sue . . . as representative parties on behalf of all . . . if . . . (3) the claims . . . of the representative parties are typical of the claims . . . and (4) the representative parties will fairly and adequately protect the interests of the class."

Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of a national securities exchange.

(1) to employ any device, scheme or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. (See SEC Sec. Exch. Act. Rel. No. 3230, May 31, 1942.)

STATEMENT OF THE CASE

Suit was filed on May 22, 1973, in Judge Eldon Mahon's Court. The original complaint allged that Jarrell Garonzik and

Milburn Garonzik, who were brothers, purchased 300 shares of Horizon Corporation from the defendant brokerage house for $12,450.70 on April 3, 1972, and sold said stock within eight months for $4,560.74, or a net loss of $7,889.96. (see plaintiff's original complaint (R. 2).).

After many months unsuccessfully trying to get the defendant brokerage house to answer two questions: (1) Was the brokerage house selling Horizon Stock while recommending it to its customers, and (2) what research was back of a 19-month selling campaign; the Garonziks filed a class action suit. This was a classical class action suit, being a securities case predicated upon the rankest type of fraud. (See original complaint, supra, and First Amended Original Complaint, App. A-1).

On October 23, 1973, the defendant filed a motion to deny the class action. This motion was predicated upon the sole point that one of the class representatives, not both, was an attorney.

The Garonziks, on November 12, 1973, filed a motion to require the defendant to specify two things: (1) any unethical conduct of the plaintiff-attorney *at any time*, and (2) how it was possible for him to be unethical when it was obvious from the record in the case that there was no solicitation, and no entrapment by the plaintiff-attorney of the defendant brokerage house (R. 111)? In short, the Garonziks believed they were entitled to nullify all wrongful innuendos raised by the defense, and have the record affirmatively reflect that this case was, at all times, *as clean as a case could ever be*. The trial court ignored this motion.

On December 10, 1973, Judge Eldon B. Mahon filed a memorandum order denying class action status (Page 38). At

the outset of his memorandum, and in his footnote number 1, in support of his ruling, he pointed out that he personally had made an investigation of past securities litigation of the plaintiff-attorney. Since there could only be but one inference to this footnote, and that was that the plaintiff-attorney had been guilty of something that was wrongful, unethical or odoriferous in this securities litigation, *which was untrue*, the plaintiff-attorney called Judge Mahon to account by a letter (R. 158) demanding to know why an ex parte investigation had been made of one attorney in this litigation without notice or a hearing.

Judge Mahon's reply letter (R. 177) was unsatisfactory. His statement that he wanted to advise plaintiffs that they had an individual cause of action was a reply but no answer.

In the meantime, the Honorable Robert W. Porter was appointed to the bench for the Dallas Division. Judge Porter advised the plaintiff that this cause had been transferred to his Court. Immediately thereafter, the plaintiffs were advised that Judge Porter had been mistaken; that this case had not been assigned to Judge Porter with other Dallas Division cases, but had been retained by Judge Mahon!

The plaintiff-attorney, as a predicate for having an investigation of Judge Mahon, immediately wrote the clerk to ascertain what other cases, if any, had been excepted from transfer to the Dallas Division. Immediately thereafter, on March 14, 1975 (repeat, 1975), this case was released from Judge Mahon's Court and assigned to Judge Robert W. Porter's Court (R. 189).

Since the order denying class status was an interlocutory order contrary to law and entered under a cloud which per-

sisted, the plaintiff filed a new motion for class status on March 20, 1975 (R. 198).

Seventeen months later, on September 3, 1975, this case was transferred to Judge Patrick Higginbotham's Court (R. 592).

During the 17 months this case rested in Judge Porter's Court, the plaintiffs attempted to obtain the Court's ear, or action by the Court in six different ways. All efforts to obtain the Court's ear, or action by the Court, failed despite the extraordinary efforts by the plaintiff-attorney. See the Docket Sheet from March 14, 1975, to September 3, 1976 (R. 189 to 592) — *403 pages* (repeat, *403 pages*) before a Judge who refused to hear or act in the case. There was, for all practical purposes, no action before the third Judge as long as the case was before him, a period of 17 months, despite over 400 pages of motions, pleadings and briefs.

Judge Higginbotham held the case from September 3, 1976, to September 28, 1976, or 25 days, whereupon the case was transferred to Judge William M. Taylor, Jr. (R. 632).

On November 26, 1976, the Garonziks, pursuant to Rule 34, F.R.C.P., requested the right to inspect certain data. The data produced indicated that during that 19-month interval when the defendant brokerage house was strongly advising its customers to buy Horizon Corporation stock less than 10 hours of time was devoted to checking into this stock, and most of this 10 hours was spent at luncheons with other securities men! (Tr. 40; R. 809).

On October 17, 1977, Judge Taylor filed an order that class action status be denied (App. A-41). In the pretrial of September 2, 1977, it had been pointed out to Judge Taylor that he had already granted class action status in a securities fraud

case, *Glenn v. Arkansas Best Corporation*, 525 F. 2d 1216 (5th Cir. 1975), wherein the plaintiff-representative was an attorney, and, moreover, where the plaintiff-attorney brought not only a class action suit, but also a derivative lawsuit (Tr. 11). Judge Taylor's view was that since the class action point "has been decided apparently by two Judges (which was incorrect) . . . I am not going to reopen that . . . we're just not Appellate Courts now, for each other." (Tr.15, Line 9, 12; 12, Line 1.) Although motions to correct trial error are addressed to the Court, not to the individual Judge, Interlocutory orders were not subject to correction.

Jarrell Garonzik, on November 9, 1977, pursuant to the power recognized in the Seventh Circuit, but denied in the opinion of the Fifth Circuit in this case, resigned and withdrew as counsel for the plaintiffs, and thereafter proceeded as if he had originally filed this suit individually along with his brother, and employed other attorneys as attorneys for the class (R. 897). He then filed a new motion for class action status on November 9, 1977 (R. 896).

On November 17, 1977, Judge Taylor denied this motion for class action status *without any hearing*, but did provide for the right of an immediate appeal of his order (R. 901).

The class found itself in the dilemma of first being denied status because Jarrell Garonzik was the attorney, and then when he was not the attorney for the class. Judge Taylor, however, did *volunteer* a second "reason", contrary to the authorities in point and without the defense even attempting to cite an authority. Judge Taylor now denied class status because Jarrell Garonzik

was a "sophisticated investor". Competency became a disqualification for representation.

The preponderance of facts indicates the class will unquestionably prevail on trial. The plaintiff-attorney is the only member of the defrauded class who knows about this fraud as the attorney-plaintiff, pursuant to all ethical requirements, never communicated with any other member of this class. Therefore, a refusal to certify him as class representative is the equivalent of fully exonerating the mass defrauder defendant because of the sole fact that Jarrell Garonzik is an attorney and/or a sophisticated investor.

REASONS AS TO QUESTION ONE
Page 4 of this Application

Old time lawyers are aware of the old strategy: If one's client is guilty, try the prosecuting attorney. It's not relevant, but it can confuse a weak Court or jury. The point is stated another way in the American Bar Association Antitrust Law Journal, Vol. 44, Issue 1, April, 1975:

> "Finally, antitrust discovery in class actions has now been aimed at plaintiff's counsel. Thus, defendants are asking named plaintiffs to recite chapter and verse about the initiation of the lawsuit and arrangements for the payment of costs and expenses. So far, few courts have been receptive to such discovery, realizing, I suspect, that at bottom this is still another attempt to nip the class action in the bud for reasons unrelated to whether the antitrust laws were violated. In prohibiting such fishing expeditions the courts have indicated that any claim of ethical impropriety should be relegated, if anywhere, to separate proceedings. *IT IS SIMPLY IRREVELANT TO THE APPROPRIATENESS OF CLASS ACTION TREATMENT UNDER RULE 23. AT A MINIMUM, BEFORE SUCH INQUIRING IS PERMITTED TO PROCEED, THERE SHOULD FIRST BE SOME EVIDENCE OF MISCONDUCT.*" (Capitalization and underscoring added.)

The securities industry is probably the most devious segment of American business, including second-hand car dealers, if one can judge from the volume of reported securities fraud suits. See Professor Bromberg's work on 10b(5) litigation, and annotations to the Securities Act and the Securities Exchange Act. The violations of law are so frequent that the S.E.C. itself has often cried out for assistance from the private sector. See The Business Lawyer, Volume 23, Number 3, page 597, April 1968.

Rule 23 provides a strong deterrent to violations of the securities laws. Nowhere does it preclude attorneys from acting as class representatives and attorney. Why should it?

Attorneys are the most qualified and competent to represent the class. They must, in any and all events, represent the class as class attorneys. Why, then, should they be disqualified because they have an added incentive in the litigation, that of a class representative who has been damaged through no fault or connivance of his own?

Moreover, a class action wherein the class representative and class attorney are the same is the most ethical of all actions. It provides no chance for solicitation. It is only in cases where the class attorney is not a party to the cause that solicitation may occur.

In these cases, the interests of the attorney and the class are identical, not in conflict. If, however, it could be contended that there is a conflict because the attorney would also participate in the recovery because he was a party (what kind of reasoning is

this?), the attorney's interest as class attorney would far exceed his interest as a party litigant.

Moreover, the class attorney is always (repeat, always) subject to the scrutiny and control of the trial judge. Why should any competent judge fear a class attorney merely because he also was a victim of the fraud?

It is only when language is used as a substitute for thought that the contrary is asserted.

Regardless, the importance of the point should be decided once and for all by the Supreme Court, hopefully contrary to the Circuit Court below and consistent with the great weight of authority and sense. See *Sosna v. Iowa*, 419 U.S. 393, 42 L. Ed. 2d 532, 90 S. Ct. 552, wherein the Supreme Court approved a class action although the only party who could profit by the suit was the class attorney (personality is subservient to the facts of the case); *Surowitz v. Hilton Hotels Corporation*, 383 U.S. 363, 14 L. Ed. 807, 86 S. Ct. 845 (1966); *Lamb v. United Co.*, 57 F.R.D. 551 (S.D.N.Y., 1975); *Philadelphia Housing v American Corp.*, 323 F.S. 364 (E.D. Pa., 1970); *First American Corp. v. Foster*, 52 F.R.D. 248 (N.D. Ga., 1970).

AS TO QUESTION TWO
Page 5 of this Application

One of the ploys used by the defense counsel in class action securities cases is that the class representative, or the plaintiff in simple litigation, is a "sophisticated investor" and, therefore, all of the defendant's frauds are of no consequence. While the nonsense of this argument has been refuted many times by the Courts, including the Fifth Circuit (see *Stein v. Smith*,

473 F. 2d 1205 (5th Cir. 1973), the Fifth Circuit now asserts the validity of this erroneous contention. The reason given is that the enforcement of Rule 23 is a matter of discretion to be enforced at the will of the trial court; Rule 23 creates no duty of enforcement upon trial courts in the Fifth Circuit.

It is highly important that the Supreme Court state the rules regarding sophisticated investors, both for Rule 23 purposes and under Rule 10b(5) of the Exchange Act.

It is believed a correct statement of the law is as follows:

1. Sophisticated investors are within the protection of both Rule 23 and Rule 10b(5).

2. In a case of fraudulent misrepresentation under Rules 23 and 10b(5), the ultimate test is materiality rather than reliance.

3. Even if reliance be the test, a Rule 23 case will lie as to the issue of liability, and the issue of reliance can then be treated individually.

4. In a case of material concealment, as in the instant case, the proof of reliance is not necessary.

5. The Courts will permit a sophisticated investor to act as class representative and attorney and represent both sophisticated and unsophisticated investors, because the law desires the knowledgeable and the strong to represent the unsophisticated and the weak.

6. Sophisticated investors, like all others, are entitled to the truth. *Stein v. Smith*, 473 F. 2d 1205 (5th Cir. 1973).

These rules should be announced (or refuted) without delay to lessen litigation.

The instant case is directly in conflict with the Supreme Court case of *Surowitz v. Hilton Hotels Corporation*, 383 U. S.

363, 15 L. Ed. 807, 86 S. Ct. 845 (1966), for two clear reasons:

1. *Surowitz* interprets Rule 23a for its substance; it preserves the rule and does not destroy it pursuant to pretext.

2. *Surowitz* specifically states that insinuation is not the equivalent of proof, that Rule 23 is interpreted from *the trial record, not the desires of individual judges;* that neither conflict nor any other material fact, can be assumed or insinuated, and especially when it is contrary to the trial record and the truth.

AS TO QUESTION THREE
Page 5 of this Application

Obviously, the rule announced in the Seventh Circuit contrary to the ruling below in this case is preferable, and should be adopted by the Supreme Court. See *Susman v. Lincoln* American Corp., 561 F. 2d 86 (7th Cir., 1977).

While the Fifth Circuit cited *Susman* in its opinion, here is what *Susman* actually said:

> "As the district judge noted, plaintiffs are free to seek different counsel and thereby dispel any possibility of conflict."

The "possibility of conflict" is not the conflict with which Rule 23 is concerned. Rule 23 is concerned with actual conflict. The "possibility of conflict" is a public relations venture by the Courts. The point is destroyed by the overwhelming fact that the public will never understand nor approve of the Court's dismissing a mass criminal because the class representative is a high calibre attorney. The public wants their champion against fraud protected, not destroyed by the Courts.

The simple fact here is that the petitioner has been the sole champion of the defrauded class and the lower courts have been the implacable enemy of the defrauded class, and the advocate for the mass wrongdoer. This fact is not noted below because the Courts have a policy of erroneously substituting words for facts, and phraseology for analysis.

AS TO QUESTION FOUR
Page 6 of this Application

In *Rio Grande v. Gildersleeve*, 174 U. S., 1102 (1899), the Supreme Court of course held with the rule of law, clearly holding contrary to the opinion below as follows:

> "As no discretionary power was reserved to the trial judge (by the rule involved) he could not dispense with this rule of Court. As was said in *Thompson v. Hatch*, 3 Pick, 512: 'A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case . . . The courts may rescind or repeal their rules without doubt; or in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied in all cases which come within it, until it is repealed by the authority which made it.' "

The petitioner stated that he never believed that after practicing law for 45 years he would apply to the Supreme Court to grant certiorari on such a fundamental point, that he would have to fight legal anarchy within the judiciary itself. The judiciary has strayed far from many fundamentals as evidenced by this one record, but here it goes too far by nullifying the rule of law under the guise of trial court discretion. This case is a negation of what American law represents.

If the Supreme Court cannot pause on this point, what good is it to announce rules in other cases, if these rules can be nullified at the whim or caprice of all the Courts below?

Also see *Surowitz,* supra, where the Supreme Court asserts the substance of Rule 23 against those who would destroy it by the mechanism of attacking the class representative and diverting attention from the facts of the case.

AS TO QUESTION FIVE
Page 6 of this Application

This application has heretofore noted *two* unconstitutional practices: (1) a descent by a trial judge to personally intervene on behalf of a defendant, and (2) a Circuit Court opinion which has relegated rules of law to the uncontrolled "discretion" of trial judges for enforcement.

The fifth reason for certiorari embraces a more subtle, but equally dangerous, procedure accomplished below, and that is, the factual misconstruction of a trial record.

An Irishman once said, "I do not care who writes a nation's laws if I can write its songs."

The theory below was "I do not care who writes a nation's laws if I can misconstrue its trial records to destroy Rule 23."

The erroneous misconstruction and obfuscation of the record is not an isolated fact below.

We begin with the basic fact that the only trial record that actually existed in this case was a bare bones record that reflected there were two plaintiffs who offered to represent the class — one a layman and one a lawyer. The lawyer had investigated the fraud, asked the defendant to answer two important questions, and after obtaining no proper response, filed suit as attorney for the class.

The defendant's motion against the certification of the class never attacked the plaintiff-attorney personally or professionally. All the defendant asked for was a per se ruling that an attorney could never act as class representative and class attorney because he was an attorney. That was all the record before the Court could ever warrant — that is, a per se ruling as there were no facts to warrant any other order.

All the Courts below inadvertently concealed the undeniable fact that they were rendering a per se ruling. This was done by a constant factual misconstruction of the actual trial record.

The first Court, by its order of December 7, 1973, used two mechanisms of language:

1. First, the Court stated that it might permit class action status in some future case where an attorney was class representative and class attorney. This was just another way of saying that the damage inflicted on the class by the per se ruling here might not be inflicted in a future case. This did nothing to destroy the per se ruling.

2. Secondly, the Court held that this type of fact situation created "possibly conflicting interest". The Court did not rule that, in actuality, there were any factual or legal conflicts because (1) there was no evidence of any conflict in the record; (2) the interests of the plaintiff and his class were identical, not at variance. Thus, the Court obfuscated a per se ruling by nothing more than nebulous, meaningless language — language that was meaningless in fact and meaningless in law. The simple truth is that all the Court did was to attempt to justify a per se

ruling, which is all the *record* would allow. Moreover, Rule 23 is not concerned with speculative, nonexistent conflicts destroying a class; it is concerned with actual conflict. As there was no actual conflict here, the Court obfuscated its per se ruling by the use of vague language.

A trial Court cannot, constitutionally, inadvertently change a record and say that a per se ruling is not a per se ruling by using vague, diaphanous, meaningless language as was done here. Certainly, if the constitutional point be not pursued, a Court cannot destroy Rule 23 by the misconstruction of the fact record before it; if it could so destroy the Rule, a trial Court could overrule the Supreme Court at will through the process of factual misconstruction of a record.

The fourth trial judge in this case begins his order of October 17, 1977, with the following words: "Four Judges of this District have now had this case on the docket. Plaintiff has moved four times that a class be certified."

The implication is that four Courts seriously considered the Motion for Certification.

The facts are:

1. The first Judge's conduct was unconstitutional and unconscionable, and the plaintiff-attorney should have been commended rather than condemned for his fight against a star chamber inquisition, which proved nothing adverse because there was nothing adverse in his entire record.

2. The second Judge sat (repeat, *sat*) on this case for 17 months. Four motions for certification were filed before this Judge alone, showing a diligence that caused some consternation. The Judge did not enter any order on certification, although various orders for and against certification were presented to him by the plaintiff.

3. The third Judge would take no cognizance of this case whatsoever, but immediately transferred it to the fourth Judge.

4. The petitioner's attempts to serve the class did not sit well with the fourth Judge. His order, continuing the judicial obfuscation of the facts, states, "Plaintiff still persists in urging a class certification". The fourth Judge then proceeds to volunteer a point defense counsel never presented because it was no good, and that is, "Plaintiff Garonzik admitted in his deposition which has been filed with the Clerk that he is a sophisticated investor. The Court finds that this defense raises a defense which would not be typical as to the class he proposes to represent. The Court, therefore, concludes that this is sufficient reason to refuse to certify the class proposed by plaintiff under Rule 23, F.R.C.P."

The atypicality point was construed out of thin air. There had been no hearing whatsoever on this point to determine whether any of the purchasers were unsophisticated investors. For example, when the plaintiffs purchased their stock, it was selling above $40 a share as the Court well knew. Very few purchasers of $40 stock are unsophisticated investors; they are found mainly among the lower priced stocks, which the Court knew. In addition, the public generally has been out of the market for some time. Most of those that remained were sophisticated investors.

But even if the foregoing were not common knowledge, why should the petitioner have been denied the right to represent

his class of sophisticated purchasers who were defrauded? Even if the law be so absurd as to hold that the sophisticated and knowledgeable cannot represent the weak and ignorant, why can't they represent their own class? The answer is that in this Circuit a trial court can do anything he well pleases in a class action suit unless certiorari be now granted and this be stopped.

The view of the Court is further evidenced by a needless caveat in the order which stated:

> "Plaintiff has offered to resign as counsel of record in order to have the proposed class certified. Plaintiff has not resigned as counsel of record so any ruling as to the effect of his resignation would be premature. The Court would also point out that the naming of new counsel would not automatically resolve all difficulties. Any new counsel would have to be scrutinized by the Court as to suitability and if in any way found lacking," the Court would still refuse to certify a class."

The plaintiff did resign as counsel for the class and did employ other counsel to represent the class. Upon motion for certification being made, the Court, *without any hearing*, and certainly without the scrutiny it had indicated, denied class certification by its order of November 11, 1977.

THE LEGAL RESEARCH BOARD, THE UNIVERSITY OF TEXAS SCHOOL OF LAW, WRITES NON-ADVOCATE BRIEFS ON THE LAW, STATING ITS UNDERSTANDING OF THE LAW. IT WILL NOT PRESENT AN ADVOCATE'S BRIEF. IT RENDERED AN OPINION THAT CLASS ACTION STATUS SHOULD HAVE BEEN CERTIFIED TO THE PLAINTIFF-ATTORNEY (R. 357-361).

The reason the Legal Research Board rendered the foregoing opinion is that it relied on the actual record in the case. It knew the record only warranted a per se ruling.

However, the Circuit Court, in rendering its opinion confirming the misconduct and errors described herein, factually misconstrued the true record. It stated:

> "We need not decide whether the application of an automatic rule would be reversible."

Why not? That is all the record warranted. It was a bare bones, per se, record, and nothing else insofar as the attorney point was involved. The Court had to rule per se or certify. It "chose not to certify".

How could the Court of Appeals say, "the district Court did not abuse its discretion in ruling that plaintiffs were inadequate class representatives"? What facts were in the record other than the fact that petitioner was an attorney? There were no other facts to prove inadequacy; therefore, the Circuit Court, in affirming the per se ruling, erroneously concealed the per se ruling of the trial court. The factual misconstruction continued; Rule 23 was a shambles because the true facts were erroneously concealed.

This erroneous, illegal and unconstitutional distortion of the trial record was combined with the unconstitutional and alien argument that regardless of what the rules were supposed to be, the trial court could do as he well pleased. The Court said:

> "In a subsequent order, Judge W. M. Taylor additionally held that the plaintiff's admission that he is a sophisticated investor raises a defense as to plaintiff's own claim which deprives him of the typicality of the class required for class representation. While this characteristic may or may not eventually affect

plaintiff's cause of action, see *Dupuy v. Dupuy*, 551 F. 2d 2005 (5th Cir., 1977), and while it might not have prevented class certification IF THE DISTRICT JUDGE WAS SO INCLINED, see, e.g. *Feder v. Harrington*, 52 F.R.D. 183-184 (S.D. N.Y. 1970), *IT PRESENTS A SUFFICIENT QUESTION OF TYPICALITY TO PROTECT THE DISTRICT COURT'S DECISION FROM REVERSAL ON APPEAL UNDER THE ABUSE OF DISCRETION STANDARD OF REVIEW.*" (Underlining and capitalization always added in this brief unless otherwise so stated.)

Rule 23 is a shambles. The Courts have changed a bare bones factual record, that is, a record which only reflects one fact, into another factual record.

The first Judge took the bare bones record and spoke in nebulous terms about the "possibility" of conflict. Even in barbarian societies, disputes are supposed to be decided on facts, not on unarticulated, totally unreasonable speculations and surmises of Judges. Here, there was not one scintilla of evidence to support this avoidance of a per se ruling.

The second and third Judges took no action.

The fourth Judge changed the bare bones record into something more. He not only saw a possibility of conflict — he saw actual conflict. This was a much more serious misconstruction of facts, not only of degree, but because by then the petitioner had done over 600 hours of work on the case, and the voluminous file showed it. No fair finder of fact could have held that this industrious representative was in conflict with his class. The only enemy of the defrauded class was the Courts. Basic facts continued to be inadvertently misconstrued, and thus certification was denied.

The Court of Appeals speculated about what the rules of law

may or may not be, and then concluded that it didn't make an iota of difference what the law was, the trial court could do what it pleased "under the abuse of discretion standard of review". Now, what is the standard in the Fifth Circuit for discretion? It is simple — the desire of the trial Judge; and these desires can be very strong, as evidenced by the first Judge's attempt to keep the case on his docket when his Dallas docket was being taken away from him. In short, what we have, as blandly and naively admitted by the opinion itself, is a doctrine of excuses, cliches and nebulous language to support the expressed desire of the first trial Judge.

There is nothing in the record to even suggest the following found in the Circuit Court opinion:

1. Any facts to warrant the exercise of discretion.

2. Any facts to warrant the statement, "We need not now decide whether the application of an automatic rule would be reversible."

3. "Judge Mahon. . . did not follow a per se rule that would disqualify a plaintiff as a class representative just because he was an attorney representing himself."

4. "The reasoning in his opinion demonstrates a careful exercise of his discretion in this regard. . ."

Discretion implies that a factual predicate existed in the record for its exercise other than the fact that the plaintiff was an attorney. There just were no other facts before Judge Mahon, and neither the Circuit Court nor defense counsel have ever cited any other facts to avoid this being a per se decision.

The attitude of the Circuit Court is further evidenced by the following:

> "... We direct the district court to proceed with the case as an individual action if the plaintiff cares to pursue it, and to summarily dismiss any further attempts to convert this case into a class action, whether by pleading amendment, counsel substitution, motion, discovery, or any other means which might otherwise have been available ..."

The fourth Judge never held any hearing whatsoever after the petitioner resigned and employed counsel to represent the class. No hearing was ever held as to whether the purchasers were sophisticated or unsophisticated investors — the fact that *some* purchasers were unsophisticated investors was *assumed* by the trial court, and from this assumption the trial Judge ruled that the petitioner could not represent either sophisticated or unsophisticated investors. The record was not only misconstrued, it was created by the ipse dixit of the trial Judge and thus Rule 23 was effectively nullified.

In 40 Texas Law Review 1, "The Judiciary and the Bar — Socialist Legality vs. The Rule of Law", it is pointed out that the rationale of Soviet law is to enforce the intentions of the state. Here, in class action cases the rationale of the law is to enforce the intentions of the trial Judges, *as inconsistent and as diverse as they may be*. Regardless of the fact that directly conflicting results are obtained under the same facts, the cases are approved because each Judge has exercised his unfettered discretion. One does not even have to read between the lines — it is all set out in black and white in the Court of Appeals opinion in this case. The rule of law, as we know it, is dead in Rule 23 cases. Rule 23 is dead if the trial Judge so elects.

The fact that this process of misconstruing basic facts was unintentional and inadvertent does not lessen the damages inflicted by the policy nor does it immunize this policy of nullification (of Rule 23) from constitutional attack. In addition to the constitutional grounds involving the record, these errors create grounds for certiorari because this process emasculates Rule 23.

Nonexistent possibilities of conflict, nonexistent conflicts, nonexistent impermissible discretion, evidence this process of factual distortion and misconstruction which effectively nullifies Rule 23.

The damages are the same as if done intentionally. Rule 23 is as efficiently nullified by the process of factual misconstruction as by predetermined, malevolent intention (which did not exist).

AS TO QUESTION SIX
Page 6 of this Application

The Supreme Court should also clear the air on another point that clouds class actions and 10b(5) cases, and that is the meaning of "typical" in Rule 23.

In *Carpenter v. Hull*, 311 F. S. 1099 (S.D. Tex. 1970), the Court quotes Charles Alan Wright, who says:

> "The requirement in Rule 23(a) (2) that the claims or defenses of the representative must be typical of those of the class is probably no more than a cryptic way of saying that the representative must not have interests that conflict with those he purports to represent."

It is not enough to define "typical". The Supreme Court must see that the lower courts do not avoid class actions, as here, by

ipse dixit language stating there is conflict when the record, the facts, and common sense show identity of interests rather than conflict.

The fictitious creation of a nonexistent conflict is proven by the fact that the Fifth Circuit in *Stein v. Smith,* 473 F. 2d 1205 (5th Cir. 1973) held that "sophisticated investors, like all others, are entitled to the truth". What conflict, then, could there possibly be in this type of case? A conflict that cannot be articulated does not exist.

In short, the Supreme Court must see that lower courts do not inadvertently misconstrue the record by erroneously articulating a nonexistent conflict when an identity of interest actually exists. *This dangerous policy of inadvertently contradicting facts must be stopped now.*

If this Court were shown that, in the Fifth Circuit, the actual trial records were supplanted by astrology or numerology as predicates for judgments and appellate opinions, the Supreme Court would grant certiorari without delay.

The equivalent is taking place. *Trial records are supplanted, not by astrology or numerology, but by something much more effective, and that is, an inadvertent process whereby phraseology and cliches misconstrue the record factually and thus evade certification under Rule 23.*

Inconsistent rulings among the judges mean nothing in this Circuit. One trial judge ruled one way in this case on the class action point, and another way in another case having the same identical point, wherein the same authority was cited (the *Lamb* case). The Court of Appeals, in an opinion which must have

touched the nadir in the annals of American jurisprudence, applauds, encourages and validates diversity of results in the same fact situation. A Court "may or may not" rule a certain way according to the Court of Appeals. A Court could, in this case, have certified the class action "if the district Judge was so inclined". How can the Supreme Court even hesitate to grant certiorari?

If gossamers of unwarranted insinuations are to supplant trial records in the Fifth Conflict, we should dispense with the expense and time devoted to discovery proceedings and have Al Capp's Mammy Yoakum whomp up a vision as the record of the case.

Analysts, thinkers and scholars perceive the menace. Alfred E. Kahn, the new Chairman of the Civil Aeronautics Board, in a speech before the American Bar Association last August, stated as follows:

> " 'I cannot help feeling that some among you, determined to resist our present policies with all the weapons at your command, have seized upon procedural arguments because you really can't refute our new policies substantively.' "

Kahn described the procedures by which, over the decades, new routes had been assigned.

> *"The chairman . . . would then pick up the telephone and call the general counsel and tell him who the lucky winner was, and nothing more; then a lawyer on the general counsel's staff, amply supplied with blank legal tablets and general selection of cliches — some, like "beyond-area benefits", "route strengthening" or 'subsidy-need reduction", tried and true, others the desperate product of a feverish imagination — would construct a work of fiction that would then be published as the board's opinion."*

> "My highly publicized preoccupation with the style of our orders and our opinions is not merely aesthetic; it also goes to the very heart of what we do. All too often, the use in opinions of such pomposities as "we reject the proposed course of action because we deem it in appropriate" — which means no more than "we're not going to do it because we don't want to! "

The foregoing process exists in the Fifth Circuit. Is there more important cause for certiorari? The Supreme Court of the United States should write one of its greatest opinions in this case concerning the rule of law and the need to protect it from all mechanisms of attack. This opinion should make it clear that the rule of law is not to be tampered with at the discretion of every trial judge.

At a recent ceremony wherein a new federal judge was elevated to the bench, one of the judges told about a United States Judge who concluded his prayers each night with "Oh, Lord, please don't send me any class action suits".

The fact is that if Rule 23 is going to be enforced in the Fifth Circuit, it will have to be done by virtue of direct orders of the Supreme Court, not only to recognize the Rule, but to enforce it without the unconstitutional and illegal destruction of trial records.

If certiorari be not granted in this case, the Supreme Court might just as well shut up shop. What good does it do for the Supreme Court to announce rules of law if they can be evaded at the whim or caprice of any trial judge, as the opinion below clearly states, and as the record overwhelmingly proves?

After all, trial courts of the United States are supposed to be administered by Judges, not conjurers of imaginative trial records which inadvertently evade Rule 23.

There are three basic and fundamental reasons for certiorari to issue:

1. In order that the application of Rule 23 of the Federal Rules of Civil Procedure and Rule 10b-5 of the Securities Exchange Act may be uniformly and properly interpreted throughout the United States Judicial system.

2. In order that the Fifth Circuit may not interpret Rule 23 out of existence.

3. In order that this nation may be governed by

   (a) the rule of law
   and not by

   (b) gibberish.

It is, therefore, respectfully requested that the Supreme Court of the United States issue its Writ of Certiorari to the Court of Appeals for the Fifth Circuit ordering the record in this case to be delivered to the Supreme Court of the United States for review.

Respectfully submitted,

SANDY M. SANDOLOSKI
Attorney for Petitioner
1800 Republic National Bank Tower
Dallas, Texas 75201
(214) 748-8891

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that three copies of this application have been mailed to Mr. C. Taylor Ashworth and Mr. John A. Gilliam, attorneys for the respondent, 2200 First National Bank Building, Dallas, Texas 75202, by certified mail, return receipt requested.

Sandy M. Sandoloski

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk
September 13, 1978

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:
NO. 77-3396 Jarrell Garonzik, Et Al v.
Shearson Hayden Stone, Inc. Et Al

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, Clerk
By BRENDA HAUCK
Deputy Clerk

*On Behalf of Jarrell Garonzik Et Al

CC: Messrs. Sandy Sandoloski
Michael W. McManus
Messrs. C. Taylor Ashworth
John A. Gilliam

JARRELL GARONZIK and MILBURN GARONZIK, etc., Plaintiffs-Appellants,

v.

SHEARSON HAYDEN STONE, INC., et al., Defendants-Appellees.

No. 77-3396

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

June 12, 1978.

Appeal was taken from a denial of class certification by the United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., in action alleging security fraud. The Court of Appeals held that under circumstances of case, trial court did not abuse its discretion in refusing to certify plaintiff as class representative since plaintiff was both investor and an attorney and since plaintiff's admission that he was sophisticated investor raised defense as to his own claim resulting in his being deprived of typicality of class required for class representation.

Affirmed with directions.

Federal Civil Procedure 187

Under circumstances of case, district court hearing security fraud action did not abuse its discretion in refusing to certify plaintiff as class representative since plaintiff was both investor

and an attorney and since plaintiff's admission that he was sophisticated investor raised defense as to his own claim resulting in his being deprived of typicality of class required for class representation. Fed. Rules Civ.Proc. rule 23(a)(4), 28 U.S.C.A.

Appeal from the United States District Court for the Northern District of Texas.

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

This is an appeal from a denial of class certification in a case alleging 10(b)(5) security fraud in the sales campaign of defendant stockbroker concerning the stock in Horizons, Inc. For the purposes of this appeal, the merits of the cause of action are assumed. Although we often refuse to accept an appeal of the denial of class certification, even when, as in this case, the district court certified the issue as controlling under Rule 54(b), Fed.R.Civ.P., we take this appeal on the merits in order to finally resolve the question. Inasmuch as we affirm the denial of class certification, in order to fully implement the purpose of taking this appeal, we direct the district court to proceed with the case as an individual action if the plaintiff cares to pursue it, and to summarily dismiss any further attempts to convert this case into a class action, whether by pleading amendment, counsel substitution, motion, discovery, or any other means which might otherwise have been available had we not been asked to take the appeal of this interlocutory order.

Although no application was properly made to this Court

under 28 U.S.C.A. § 1292(b), we treat the filing of plaintiff's notice of appeal as such application, the filing of defendant's brief as a stipulated waiver of formality and time requirements, and grant the appeal as if the plaintiff had properly followed the statute and the rules in the prosecution of this appeal.

A careful review of the briefs and appendix filed in this case reveal no abuse of discretion in the refusal of three district judges over a period of four years to certify the plaintiff as a class representative.

In his initial order on December 7, 1973, Judge Eldon Mahon, contrary to plaintiff's argument on appeal, did *not* follow a *per se* rule that would disqualify a plaintiff as a class representative just because he was an attorney representing himself. He did, however, give that fact due consideration as to whether the plaintiff could fairly represent the purported class.[1] The reasoning in his opinion demonstrates a careful exercise of his discretion in this regard, rather than an abuse thereof.

We need not now decide whether the application of an automatic rule would be reversible. We align ourselves with the comprehensive treatment of this matter in *Susman v. Lincoln American Corp.*, 561 F.2d 86 (7th Cir. 1977) (citing cases allowing and disallowing a plaintiff-attorney to represent the class), where the court, declining to adopt a *per se* rule, found that in the circumstances of that case the district court did not abuse its discretion in ruling that plaintiffs were inadequate class representatives.

*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

In a subsequent order, Judge W. M. Taylor additionally held that the plaintiff's admission that he is a sophisticated investor raises a defense as to plaintiff's own claim which deprives him of the typicality of the class required for class representation. While this characteristic may or may not eventually affect plaintiff's cause of action, *see Dupuy v. Dupuy*, 551 F.2d 1005 (5th Cir. 1977), and while it might not have prevented class certification if the district judge was so inclined, *see, e. g., Feder v. Harrington*, 52 F.R.D. 178, 183-184 (S.D.N.Y. 1970), it presents a sufficient question of typicality to protect the district court's decision from reversal on appeal under the abuse of discretion standard of review.

AFFIRMED WITH DIRECTIONS.

[1]This court does not seek to enunciate a belief that there are no circumstances in which it would be appropriate for an attorney to represent a class of individuals both as a member thereof and as counsel. I do not, however, believe that the circumstances wherein such a dual participation by the attorney would be warranted are present in the case at bar. In reaching this conclusion, I have given considerable weight to those matters that relate to the possibly conflicting interests of Garonzik the plaintiff, Garonzik the attorney, and the remaining members of the class. While the Court imputes no base motives to the attorney with whom these questions are herein concerned, it is strongly felt that the circumstances here present militate against a holding that the requirements of Rule 23(a)(4) can be satisfied by allowing one of the plaintiffs to participate as a member of the class and as its attorney. Further, it is noted that the Court's action today in no way divests any plaintiff of his individual rights in the cause of action alleged in the complaint. (footnote omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JARRELL GARONZIK And MILBURN GARONZIK, Individually and As Representative of a Class VS. SHEARSON, HAMMILL & CO., INCORPORATED	CIVIL ACTION NO. CA 3-7220-E

MEMORANDUM ORDER

In their complaint, plaintiffs Jarrell and Milburn Garonzik contend that representatives of defendant corporation have undertaken to act in violation of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1970), the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (1970), and in violation of the Rules and Regulations promulgated pursuant thereto. 17 C.F.R. Parts 230 and 240.[1] The matter is now before the Court for consideration of plaintiff's motion to allow this cause to proceed as a class action. Rule 23, Fed. R. Civ. P. (1970).

[1]Plaintiffs Jarrell Garonzik and Milburn Garonzik, in company with one additional co-plaintiff, brought suit against the Ling and Company brokerage in early 1971, alleging numerous violations of the Securities Act of 1933, 15 U.S.C. §77a *et seq.* (1970), and the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* (1970) (CA 3-4402-B, N.D. Tex., filed January 5, 1971). The volume of instruments filed therein reflect that the matter was pursued with some vigor until April of 1972. That cause of action was thereafter concluded by a judgment entered July 12, 1973, pursuant to a settlement reached by the parties. The case at bar was filed May 22, 1973.

Jarrell Garonzik, a practicing attorney, together with his brother Milburn Garonzik, purchased and retained stock in the Horizon Corporation upon the recommendation of one of defendant's representatives while, during the same time period, defendant was allegedly divesting itself of its shares in the corporation. Jarrell Garonzik seeks to represent the class as a member and as its attorney. Defendant Shearson, Hammell & Co., Inc., urges, *inter alia*, that plaintiffs "will not fairly and adequately protect the interests of the class" as is required by Rule 23(a)(4), Fed. R. Civ. P. (1970). The Court agrees.

In *Shields v. Valley National Bank of Arizona*, 56 F.R.D. 448 (D. Ariz. 1971), objection was made to Shields representing the class as plaintiff and as attorney "because he may lack the objectivity to represent the class by virtue of his closeness to the action as a plaintiff and thus may become emotionally and financially involved in the outcome of the case." There it was said:

> "The Court further feels that Shields has not demonstrated competence to represent the class because he seeks to be not only the attorney for the class and be awarded a fee for his representation, he seeks in the same action, personal relief. The practice involved does not seem to the Court to comport with the high quality of objectivity, duty and integrity required of lawyers practicing in this Court or elsewhere. This case seems to involve a questionable method of soliciting legal business and such solicitation should not be encouraged." 56 F.R.D. at 450.[2]

A similar determination was made in *Eovadli v. First National Bank of Chicago*, 57 F.R.D. 545, 546 (N.D. Ill. 1972), wherein it was stated: "Since the named plaintiff is also

[2]Accord, Shields v. First National Bank of Arizona, 56 F.R.D. 442 (D. Ariz. 1972).

acting as co-counsel for the class, his interest in legal fees clearly outweighs his interest as a plaintiff and creates a conflict of interest. He cannot therefore be considered a fair and adequate representative of the class."

In the case at bar Plaintiff Garonzik asks if it is right that he should have to "donate the fruits of his labor to another attorney?" In attempting to respond to that inquiry, the Court wishes to indicate that it is not unmindful of he problems inherent in class action suits in general, not the least of which is reflected in the statement that "Obviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them." *Eisen v. Carlisle & Jacquelin* (Eisen I), 391 F.2d 555 at 571 (2nd Cir. 1968) (Lumbard, C. J., dissenting). One commentator has noted that,

> "the most serious long-range consequence of the indiscriminate use of class actions [is] of the undermining of public confidence in the judicial system and the integrity of the bar. Attorneys are members of an honorable profession and are duty-bound to put their clients' interest above their own. The spectacle of lawyers reaping enormous profits from lawsuits which do not benefit their clients must be a source of embarrassment to both the judiciary and the bar. As one Court recently warned, both courts and attorneys must avoid the criticism implicit in the Italian proverb that 'A lawsuit is a fruit tree planted in a lawyer's garden.' [Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221 (N.D. Ill. 1972).]
>
> The judiciary should not participate in encouraging attorneys to become entrepreneurs who create business opportunities from which they reap large profits."[3]

[3]Simon, *Class Actions — Useful Tool or Engine of Destruction*, 55 F.R.D. 375 at 390-391 (1972).

If the cause for concern reflected in the above observations has any foundation, it would seemingly be even more applicable to class action proceedings wherein the attorney was also a party. This Court does not seek to enunciate a belief that there are no circumstances in which it would be appropriate for an attorney to represent a class of individuals both as a member thereof and as counsel. I do not, however, believe that the circumstances wherein such a dual participation by the attorney would be warranted are present in the case at bar. In reaching this conclusion, I have given considerable weight to those matters that relate to the possibly conflicting interests of Garonzik the plaintiff, Garonzik the attorney, and the remaining members of the class. While the Court imputes no base motives to the attorney with whom these questions are herein concerned, it is strongly felt that the circumstances here present militate against a holding that the requirements of Rule 23(a)(4) can be satisfied by allowing one of the plaintiffs to participate as a member of the class and as its attorney.[4] Further, it is noted that the Court's action today in no way divests any plaintiff of his individual rights in the cause of action alleged in the complaint.

The motion to permit this matter to proceed as a class action is denied.

Entered this 7th day of December, 1973.

ELDON B. MAHON

UNITED STATES DISTRICT JUDGE

[4]Nor am I inclined to believe the problems would be alleviated by allowing one of the Garonzik brothers to proceed as named party-plaintiff and the other as counsel for the class. *See* Shields v. First National Bank of Arizona, 56 F.R.D. 442, n.1 (D. Ariz. 1972).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JARRELL GARONZIK and
MILBURN GARONZIK,
Individually and as
Representatives of a
Class
vs.
SHEARSON HAYDEN
STONE INC.

CA 3-7220C

MEMORANDUM AND ORDER

Four Judges of this District have now had this case on the docket. Plaintiff has moved four times that a class be certified. Judge Eldon Mahon, the first Judge to sit in this case, refused to certify a class principally because plaintiff Jarrell Garonzik is also the attorney of record. Judge Robert W. Porter, the next Judge to sit in this case, refused to vacate the earlier order and certify a class. Judge Patrick E. Higginbotham, the third Judge, recused himself before ever ruling on a class certification motion. Plaintiff still persists in urging a class certification. Plaintiff Garonzik admitted in his deposition which has been filed with the Clerk that he is a sophisticated investor. The Court finds that this admission raises a defense available to defendant as to plaintiff's own claim that would not be typical as to the class that he has proposed to represent.

The Court, therefore, concludes that this is sufficient reason to refuse to certify the class proposed by plaintiff under Rule 23, F.R.C.P.

Plaintiff has offered to resign as counsel of record in order to have the proposed class certified. Plaintiff has not resigned as counsel of record so any ruling as to the effect of his resignation would be premature. The Court would also point out that the naming of new counsel by plaintiff would not automatically resolve all difficulties. Any new counsel would have to be scrutinized by the Court as to suitability and if in any way found lacking, the Court would still refuse to certify a class even if the problem discussed in the preceding paragraph was gotten around in some manner by plaintiff.

Therefore, treating plaintiff's subsequent Motions to Certify a Class as a Motion to Vacate the prior Order refusing to certify a class, it is

ORDERED that plaintiff's motion is denied.

Plaintiff has filed six sets of Interrogatories, Requests for Production, Requests for Admission and numerous Motions to Compel. At the pretrial conference held in this case on September 2, 1977, the Court announced that it believed that discovery could best proceed by the taking of depositions. It announced that it would review the interrogatories and answers thereto and then make an appropriate order. The Court after reviewing the discovery on file with the Court believes that plaintiff wants a confession from defendant in its answers and that its impression at the pretrial was correct; discovery at this point would best proceed by the taking of depositions, including plaintiff's. It is, therefore,

ORDERED that plaintiff's Motions to Compel Discovery and for Summary Judgment are denied, and that discovery proceed by the taking of depositions at this time, including the deposition of the plaintiff, Jarrell Garonzik.

UNITED STATES DISTRICT JUDGE

Oct. 17, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JARRELL GARONZIK,
ET AL
vs.
SHEARSON HAYDEN STONE,
INC.

CA 3-7220-C

ORDER

Came on for consideration Plaintiffs' "Motion That Class Action Status Be Granted," and the Court having heretofore entered Memorandum Opinion and Order on October 17, 1977, denying certification of this cause as a class action, and therein having pointed out that three judges of this district, to wit, Judge Mahon, Judge Porter, and the Judge of this Court, have heretofore denied certification of class action status, and being of the same opinion, it is, accordingly,

ORDERED, ADJUDGED and DECREED by the Court that class action status in this case be, and it is hereby, DENIED.

SIGNED and ENTERED this 11th day of November, 1977.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JARRELL GARONZIK, ET AL
VS.
SHEARSON HAYDEN STONE, INC. } CA 3-7220-C

ORDER

Came on for consideration Plaintiffs' "Motion That Class Action Status Be Granted," and the Court having heretofore entered Memorandum Opinion and Order on October 17, 1977, denying certification of this cause as a class action, and therein having pointed out that three judges of this district, to wit, Judge Mahon, Judge Porter, and the Judge of this Court, have heretofore denied certification of class action status, and being of the same opinion, it is, accordingly.

ORDERED, ADJUDGED and DECREED by the Court that class action status in this case be, and it is hereby, DENIED.

In compliance with and in fulfillment of Rule 54(b), Federal Rules of Civil Procedures, the Court hereby DIRECTS, ORDERS, ADJUDGES and DECREES that this Order is, and shall be, a final judgment insofar as the maintenance of this case as a class action is concerned, and there is no just reason for delay, and so certifies to such fact; and the Court hereby expressly directs that this Order be entered by the Clerk of

this Court as such final judgment, thus permitting the Plaintiffs to appeal this Order as a final judgment to the Fifth Court of Appeals.

SIGNED AND ENTERED this 17th day of November, 1977.

UNITED STATES DISTRICT JUDGE